

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL  
5 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY  
6 TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE  
7 ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT  
8 STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR  
9 PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

10 At a stated term of the United States Court of  
11 Appeals for the Second Circuit, held at the Thurgood  
12 Marshall United States Courthouse, Foley Square, in the  
13 City of New York, on the 10th day of September, two  
14 thousand four.

15 PRESENT: HON. ELLSWORTH VAN GRAAFEILAND,  
16 HON. DENNIS JACOBS,  
17 HON. ROSEMARY S. POOLER,  
18 Circuit Judges.

19 - - - - -X  
20 UNITED STATES OF AMERICA,

21 Appellee,

22 -v.-

03-1082

23 AHMED ELASHMOUNY

24 Defendant-Appellant,

25 - - - - -X  
26 APPEARING FOR APPELLANT: DEVIN MCCLAUGHLIN, Middlebury,  
27 VT

28  
29 APPEARING FOR APPELLEES: JOHN F. CURRAN, Assistant  
30 United States Attorney for the  
31 Eastern District of New York

1           **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**  
2   **ADJUDGED AND DECREED** that the judgment of the district  
3   court be **AFFIRMED**.

4           Appeal from the United States District Court for the  
5   Eastern District of New York (Hurley, J.).

6           Defendant-Appellant Ahmed Elashmouny appeals from a  
7   principal sentence of 44 months incarceration following  
8   his guilty plea to charges of, inter alia, wire and  
9   credit-card fraud in violation of 18 U.S.C. §§ 1343 and  
10   1029. Elashmouny challenges (i) the district court's  
11   refusal to grant him a three-level downward adjustment  
12   pursuant to § 2X1.1 of the United States Sentencing  
13   Guidelines (November 1, 2000 edition); (ii) the court's  
14   calculation of the total loss attributable to  
15   Elashmouny's frauds at \$120,087, resulting in a seven-  
16   level increase under the Guidelines; and (iii) the  
17   court's refusal to grant him an acceptance-of-  
18   responsibility reduction. Familiarity by the parties is  
19   assumed as to the facts, procedural context, and the  
20   specification of appellate issues. We affirm.

21           "In reviewing a sentence imposed under the Sentencing  
22   Guidelines, we 'accept the findings of fact of the  
23   district court unless they are clearly erroneous,' 18  
24   U.S.C. § 3742(e), and 'will not overturn the court's  
25   application of the Guidelines to the facts before it  
26   unless we conclude that there has been an abuse of  
27   discretion. However, [w]here a sentencing court's  
28   application of the guidelines approaches a purely legal  
29   question, we employ a de novo standard of review.'" United States v. Deming, 269 F.3d 107, 109 (2d Cir. 2001)  
30   (quoting United States v. Hernandez-Santiago, 92 F.3d 97,  
31   100 (2d Cir.1996) (citation and quotation marks  
32   omitted)). At sentencing, Elashmouny argued that he was  
33   entitled to a three-level reduction under U.S.S.G.  
34   § 2X1.1. The district court was initially inclined to  
35   agree [**A 88-93**], but ultimately denied the reduction on  
36   the ground that Elashmouny's "core criminality [] was  
37   endeavoring to obtain a policy after an accident and then  
38   make a claim that the accident was covered by that  
39   policy" [**A 96**], not a simple attempt fraudulently to  
40   recover \$40,000 under then-existing coverage. On these  
41   facts, the district court found that the insurer's  
42   discovery of the fraud occurred not during the course of  
43   the claims process, but as a result of an extraneous  
44

1 "interruption" that took the fraud outside the scope of  
2 U.S.S.G. § 2X1.1. [A 93-97]. The district court's  
3 finding was not clearly erroneous or a legal error, nor  
4 was its decision to deny Elashmouny a § 2X1.1 deduction  
5 an abuse of discretion.  
6

7 At the time Elashmouny committed his crime, the  
8 length of a sentence for fraud was calculated in part  
9 based on the amount of the loss under U.S.S.G. § 2F1.1.  
10 The relevant application notes instruct that "if an  
11 intended loss that the defendant was attempting to  
12 inflict can be determined, th[at] figure will be used if  
13 it is greater than the actual loss," U.S.S.G. § 2F1.1  
14 n.8, and that such amount "need not be determined with  
15 precision." Id. n.9. During the course of a three-day  
16 sentencing hearing the district court made detailed  
17 evidentiary findings and ruled that the loss attributable  
18 to Elashmouny's fraud exceeded \$120,000. Elashmouny  
19 disagrees with the district court's calculations but  
20 offers no basis to conclude that they are clearly  
21 erroneous.

22 Finally, Elashmouny contends that he was improperly  
23 denied credit for acceptance of responsibility pursuant  
24 to U.S.S.G. § 3E1.1. "[A] sentencing court's evaluation  
25 of whether a defendant has accepted responsibility is  
26 entitled to great deference on review because of the  
27 court's unique position to evaluate a defendant's  
28 acceptance of responsibility." United States v. Remini,  
29 967 F.2d 754, 761 (2d Cir. 1992) (citation and quotation  
30 marks omitted). "Whether the defendant has accepted  
31 responsibility is a factual question, and [a] district  
32 court's determination in this regard should not be  
33 disturbed unless it is without foundation." United  
34 States v. Harris, 13 F.3d 555, 557 (2d Cir. 1994)  
35 (citation and quotation omitted). It was within the  
36 district court's discretion to deny Elashmouny's request;  
37 while he pled guilty to all charges without the benefit  
38 of a plea bargain, the district court found that he  
39 "frivolously contested some of the relevant conduct . . .  
40 that the Court ha[d] determined to be true," e.g., his  
41 efforts to defraud the Long Island Jet Center.  
42

43 For the reasons set forth above, the judgment of the  
44 district court is hereby **AFFIRMED**.

1           The mandate in this case will be held pending the  
2 Supreme Court's decisions in United States v. Booker, No.  
3 04-104, and United States v. Fanfan, No. 04-105 (to be  
4 argued October 4, 2004). Should any party believe there  
5 is a need for the district court to exercise jurisdiction  
6 prior to the Supreme Court's decisions, it may file a  
7 motion seeking issuance of the mandate in whole or in  
8 part. Although any petition for rehearing should be  
9 filed in the normal course pursuant to Rule 40 of the  
10 Federal Rules of Appellate Procedure, the court will not  
11 reconsider those portions of its order that address the  
12 defendant's sentence until after the Supreme Court's  
13 decisions in Booker and Fanfan. In that regard, the  
14 parties will have until fourteen days following the  
15 Supreme Court's decision to file supplemental petitions  
16 for rehearing in light of Booker and Fanfan.

17                           FOR THE COURT:  
18                           ROSEANN B. MACKECHNIE, CLERK  
19                           By:  
20

21                           \_\_\_\_\_  
22                           Lucille Carr, Deputy Clerk